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The Modern Concept of Duty: *Hoyem v. Manhattan Beach City School District* and School District Liability for Injuries to Truants

By Matthew A. Hodel*

Introduction

California tort law has long imposed liability on school authorities who fail to adequately supervise the conduct of students on school grounds.¹ Recently the California Supreme Court in *Hoyem v. Manhattan Beach City School District*² was presented for the first time with a claim that on-premises negligent supervision was actionable even though the actual injury occurred off-campus while the student was truant.³ The injured pupil, Michael Hoyem, was a ten-year-old boy enrolled in the summer session of a local elementary school. During the school day, and before his final classes were dismissed, Michael left the

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1. See, e.g., *Ahern v. Livermore Union High School Dist.*, 208 Cal. 770, 284 P.2d 1105 (1930); *Buzzard v. East Lake School Dist.*, 34 Cal. App. 2d 316, 93 P.2d 233 (1939). See also Note, *Negligence Liability of School-Teachers in California*, 15 HASTINGS L.J. 567, 567 (1964).

School districts are vicariously liable for the tortious acts and omissions of employees to the same extent that such acts or omissions would raise a direct cause of action against such employees. CAL. GOV'T CODE § 815.2 (West 1966).

Private schools are subject to the same principles of liability for injuries resulting from negligent supervision. *Martin v. Roman Catholic Archbishop*, 158 Cal. App. 2d 64, 322 P.2d 31 (1958) (by implication); *Stockwell v. Board of Trustees*, 64 Cal. App. 2d 197, 148 P.2d 405 (1944).

2. 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978).

3. Petition for Hearing at 15, *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978). As will be discussed in this Note, the question presented was unique with respect to the allegation that the obligation to provide reasonable supervision includes the duty to prevent students from leaving campus without permission. See notes 22, 51-52 & accompanying text *infra*. But cf., *Satariano v. Sleight*, 54 Cal. App. 2d 278, 129 P.2d 35 (1942) (nonsuit for school official reversed where student struck by automobile while running across public street between gymnasium and athletic field). *Satariano* is distinguishable from *Hoyem* since it deals with off-campus injuries to students who were authorized to leave the premises and yet who had not received ample warning of traffic hazards.

school grounds without permission.⁴ At a nearby intersection he was struck and seriously injured by a negligent motorcyclist.⁵

Michael and his mother sued the school district⁶ for personal injuries and damages, alleging that the district's failure to take proper precautions against truancy was the cause of the injury.⁷ The school district acknowledged its obligation to provide on-campus supervision,⁸ but demurred to the complaint, contending that both the Education Code and case law shielded it from liability for off-campus injuries to truants.⁹ The trial judge sustained the demurrer¹⁰ and the court of appeals affirmed.¹¹

On appeal, the California Supreme Court reversed. The majority, in an opinion written by Justice Tobriner,¹² rejected the contention that truants are barred from recovering for off-campus injuries and reinstated the plaintiffs' cause of action for negligence based upon breach of a duty to exercise due care in supervising Michael while he was on campus.¹³ Justices Clark and Richardson¹⁴ in strong dissenting opinions argued that public policy should preclude imposition of a duty to

4. CAL. EDUC. CODE § 48260 (West 1978) defines a "truant" as any student subject to compulsory education who is absent more than three school days without an excuse or is tardy in excess of thirty minutes on each of more than three school days in the same school year. Courts, however, describe any juvenile who leaves campus without permission as a truant, regardless of the number of prior, unauthorized departures or tardies. See *In re Jorge S.*, 74 Cal. App. 3d 852, 857, 141 Cal. Rptr. 722, 724-25 (1977). The Justices in *Hoyem* also described the plaintiff as a truant without regard to a prior history of truancy or tardiness. 22 Cal. 3d at 519, 585 P.2d at 857, 150 Cal. Rptr. at 7. See also CAL. EDUC. CODE § 48264 (West 1978) (dealing with the "arrest of truants," it empowers authorities to arrest any student found away from school during the school day without a valid excuse).

In this Note, "truant" is used to describe only those students who arrive at school and then leave during the school day without permission. "Truant" does not include those students who never arrive at school and remain away during the entire school day.

5. 22 Cal. 3d at 512, 585 P.2d at 853, 150 Cal. Rptr. at 3.

6. A separate action was filed against the driver of the motorcycle. *Id.* at 512 n.1, 585 P.2d at 853, 150 Cal. Rptr. at 3.

7. Additionally, Mrs. Hoyem sought damages for her loss of Michael's "comfort and society" and for the injuries she suffered on viewing Michael in his injured state at the hospital. The supreme court sustained a demurrer on these causes of action, reaffirming several of its prior holdings. *Id.* at 512, 585 P.2d at 853, 150 Cal. Rptr. at 3. The aspect of the decision relating to Mrs. Hoyem's personal causes of action has no bearing upon the issues of truancy and negligent supervision and is beyond the scope of this Note.

8. Opposition to Petition for Hearing at 2 n.1.

9. 22 Cal. 3d at 514-18, 585 P.2d at 854-57, 150 Cal. Rptr. at 4-7. See also notes 57-63 & accompanying text *infra*.

10. *Id.* at 512, 585 P.2d at 853, 150 Cal. Rptr. at 3.

11. *Hoyem v. Manhattan Beach City School Dist.*, 2d Civ. No. 48605, slip op. at 10 (Cal. Ct. App. July 21, 1977).

12. Chief Justice Bird, Justice Manuel and Justice Newman concurred.

13. *Id.* at 513-20, 585 P.2d at 853-58, 150 Cal. Rptr. at 3-8. See notes 51-63 & accompanying text *infra*.

14. Justice Mosk concurred with the dissenting Justices.

prevent injuries to truants.¹⁵

This Note will discuss the *Hoyem* decision in two contexts. First, inquiry is directed to the holding of the case. The legal, political, and economic arguments offered by both parties on appeal, the resolution of the issues by the Tobriner majority, and the response thereto by the dissenting Justices are examined. The second half of this Note examines *Hoyem* and its relation to the modern concept of duty. The trend to simplify and expand this element of negligence is analyzed in an attempt to decipher those factors most significant to its imposition. Next, the role these factors played in the *Hoyem* "duty balance" is identified. Finally, this Note suggests that the new approach to questions of duty as applied in *Hoyem* fails to sufficiently address the problem that truancy presents to educational administration and that, as a result, the *Hoyem* court attempted to resolve issues more properly left to legislative solution.

Hoyem v. Manhattan Beach City School District: Negligent Supervision and the Truant

Hoyem presented a novel question to the California Supreme Court: is a school district liable for injuries sustained off campus by a pupil who voluntarily and without authorization leaves school premises during the school day? The possible answers to this issue may best be understood by examining the theories of liability offered by the Hoyems and nonliability offered by the school district.

The Hoyem's Appeal

Despite the off-campus situs of the injury, Michael Hoyem and his mother urged that their appeal should be controlled by the principle that schools have a duty to supervise students who are on school grounds during the school day.¹⁶ School authorities are generally held to an on-campus standard of care similar to that of private citizens acting in a private context: a teacher or school authority on school grounds must protect and supervise students according to the standard of a prudent and ordinary person entrusted with the care of school-age chil-

15. *Id.* at 523-28, 585 P.2d at 860-63, 150 Cal. Rptr. at 10-13. See notes 75-84 & accompanying text *infra*.

16. Petition for Hearing at 6, *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1978. See generally Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 747, 470 P.2d 360, 363, 87 Cal. Rptr. 376, 379 (1970); Dugan, *Teachers' Tort Liability*, 11 CLEV.-MAR. L. REV. 512, 514 (1962); Mancke, *Liability of School Districts for the Negligent Acts of Their Employees*, 1 J.L. & EDUC. 109, 117-27 (1972); Proehl, *Tort Liability of Teachers*, 12 VAND. L. REV. 723, 739-51 (1959); Seitz, *Legal Responsibility Under Tort Law of School Personnel and School Districts as Regards Negligent Conduct Toward Pupils*, 15 HASTINGS L.J. 495, 498-508 (1964).

dren.¹⁷ School districts in turn, are vicariously liable for the school ground negligence of individual teachers.¹⁸ Questions relating to the adequacy and reasonableness of supervision,¹⁹ insufficiency of supervision as a proximate cause of the injury²⁰ and the foreseeability of harm are²¹ resolved by the trier of fact.

The success of the Hoyems' appeal depended upon a determination of the scope of a teacher's duty to supervise. While the rules imposing liability for negligence resulting in on-campus injuries were well-established,²² the applicability of these rules was unclear regarding a student who was able to leave school grounds because of inadequate supervision and who was subsequently injured. A stumbling block for the Hoyems was the substantial body of statutory and decisional authority that explicitly precludes school liability for certain types of off-campus injuries. Generally, decisional law denies the existence of a duty of care when students are travelling to and from school,²³ have been sent home from school before the end of the school day²⁴ or engage in off-campus activities unrelated to any school pur-

17. *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 747, 470 P.2d 360, 363, 87 Cal. Rptr. 376, 379 (1970); *Lilienthal v. San Leandro Unified School Dist.*, 139 Cal. App. 2d 453, 456, 293 P.2d 889, 891 (1956). Lack of ordinary care on the part of school officials may result from the total absence of supervision or ineffective supervision. *Dailey v. Los Angeles Unified School Dist.* 2 Cal. 3d at 747, 470 P.2d at 363, 87 Cal. Rptr. at 379.

18. This vicarious liability is the effect of CAL. GOV'T CODE § 815.2(a) (West 1966). For a general discussion and survey of school district liability statutes, see Mancke, *Liability of School Districts for the Negligent Acts of Their Employees*, 1 J.L. & EDUC. 109, 113-17 (1972).

19. *E.g.*, *Ziegler v. Santa Cruz City High School Dist.*, 168 Cal. App. 2d 277, 284, 335 P.2d 709, 713 (1959).

20. *E.g.*, *Beck v. San Francisco Unified School Dist.*, 225 Cal. App. 2d 503, 508, 37 Cal. Rptr. 471, 474 (1964).

21. *Cf. Wright v. Arcade School Dist.*, 230 Cal. App. 2d 272, 279, 40 Cal. Rptr. 812, 815 (1964) (Although foreseeability of harm is an element of duty, it becomes a question of fact rather than a question of law where the ultimate duty issue rests upon foreseeability of harm).

22. *See e.g.*, authorities cited notes 1, 16 *supra*.

23. *See e.g.*, *Gilbert v. Sacramento Unified School Dist.*, 258 Cal. App. 2d 505, 65 Cal. Rptr. 913 (1968) (no duty to prevent child from crossing dangerous railroad tracks on way home from school); *Wright v. Arcade School Dist.*, 230 Cal. App. 2d 272, 40 Cal. Rptr. 812 (1964) (no duty to provide supervision at busy intersection which child crossed on way to school); *Girard v. Monrovia City School Dist.*, 121 Cal. App. 2d 737, 264 P.2d 115 (1953) (no duty to provide transportation for child transferred to a less safely reached school).

24. In *Kerwin v. County of San Mateo*, 176 Cal. App. 2d 304, 1 Cal. Rptr. 437 (1959), an eleven-year-old boy was asked to take his younger brother, who had become ill, home from school. On the way home, the older boy was injured. In holding that there was no duty owed by the school district, the court observed that the plaintiff had failed to allege why the boy could not safely negotiate his own way home and appreciate danger when "[t]housands of 11-year-old school boys, as well as those of younger years, travel to and from school daily without school supervision." *Id.* at 309, 1 Cal. Rptr. at 440. The *Kerwin* court found it significant that the defendant had not undertaken to provide transportation

pose.²⁵ The rules derived from these cases have a statutory basis in section 44808 of the California Education Code.²⁶ This statute negates any duty to supervise students who are not on school property and limits duty to the school ground area *unless* the district "has undertaken to provide transportation for such pupil to and from the school premises . . . has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances."²⁷ In the event of an undertaking of this nature, liability is imposed "only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board."²⁸

Apparently both the trial court and the court of appeal felt that section 44808 and the surrounding body of decisional law, rather than the cases establishing an on-campus duty, were controlling on the issue of duty. The assumptions underlying both courts' reasoning were that if there had been a breach of duty, it was the failure to supervise Michael *after* he left the premises and that the breach occurred at the situs of the injury, the intersection.²⁹ Thus, because the plaintiff was travelling from school and his presence at the intersection was both voluntary and unrelated to any school purpose, the trial court held the district owed him no duty. The court of appeal reasoned, moreover, that even assuming *arguendo* that a duty was owed under these circumstances, the defendant had no reason to foresee any harm to the plaintiff.³⁰

Before the California Supreme Court, the Hoyems insisted the lower court rulings were the result of an erroneous interpretation of the duty and breach asserted in their complaint. They had alleged that the breach occurred while Michael was on school grounds where teachers

for the two boys nor did it have knowledge that the boys were going to ride home tandem on a bicycle built for one rider. *Id.* at 307, 1 Cal. Rptr. at 439. *Cf.* *Hanson v. Reedley Joint Union High School Dist.*, 43 Cal. App. 2d 643, 111 P.2d 415 (1941) (school district liable where tennis coach arranged for a student known to be a reckless driver and known to have a dangerous car to transport students home after tennis practice).

25. In *Castro v. Los Angeles Bd. of Educ.*, 54 Cal. App. 3d 232, 126 Cal. Rptr. 537 (1976), a case arising out of the death of a student participating in an R.O.T.C. summer outing, the court reasoned that school district liability for off-campus injuries was preserved where the activity was part of a school curriculum, such as a band or orchestra performance or a class that meets off school grounds, which required attendance at an off-premises event. Other students who engage in non-required field trips or excursions could not bring an action since the "voluntary nature of the event absolves the district of liability." *Id.* at 236, 126 Cal. Rptr. at 540.

26. CAL. EDUC. CODE § 44808 (West 1978).

27. *Id.*

28. *Id.*

29. Brief of Appellants at 15-22; *Hoyem v. Manhattan Beach City School Dist.*, 2d Civ. No. 48605, slip op. at 10. (Cal. Ct. App. July 21, 1977).

30. *Hoyem v. Manhattan Beach City School Dist.* 2d Civ. No. 48605, slip op. at 10 (Cal. Ct. App. July 21, 1977).

and other administrators had an established duty to provide reasonable supervision.³¹ Under this interpretation the trial and appeals courts' reliance on the situs of the injury and the status of the plaintiff as a truant were asserted to be mistaken. The plaintiffs argued that they never had alleged that the law imposes a duty toward truants or students off-campus.³² They had simply contended that the applicable authority was that imposing a duty of ordinary care *on-campus*.³³

As support for this argument, the Hoyems cited two provisions of the California Education Code. Section 44807 empowers school authorities to "control" students and to hold them strictly accountable on the playground and during recess for the purpose of protecting student health and safety.³⁴ Whether this provision was intended solely to protect students from each other was not argued, the Hoyems offered it only to establish a duty of schoolyard supervision.³⁵ They also cited an exception to section 44808's preclusion of a duty to prevent off-campus injuries, contending the district had undertaken to supervise Michael when he arrived at school yet "had failed to exercise reasonable care under the circumstances."³⁶ The Hoyems argued that taken together these statutes indicated that the duty to prevent unauthorized departures was included within the duty to exercise reasonable supervision.³⁷

They further maintained that the districts failure to discharge its duty of reasonable care was the proximate cause of Michael's injuries.³⁸ The Hoyems concluded that Michael's departure from the school grounds and his subsequent injury were foreseeable, despite the intervening negligent third party, because the combination of summertime distractions and inadequate control were likely to encourage young children to be mischievous.³⁹

31. Brief of Appellants at 16. See notes 1, 16-21 & accompanying text *supra*.

32. Brief of Appellants at 17.

33. *Id.* at 10-12, 16-17.

34. CAL. EDUC. CODE § 44807 (West 1978) provides in pertinent part that school authorities shall exercise reasonable care on school grounds to the same extent that a parent could to protect the health and safety of pupils.

35. Brief of Appellants at 11-12.

36. CAL. EDUC. CODE § 44808 (West 1978). See notes 26-28 & accompanying text *supra*.

37. Brief of Appellants at 11-15.

38. *Id.* at 28-34.

39. *Id.* at 24; Appellant's Reply Brief at 40. Persons with supervisory responsibilities must anticipate that young children are more likely to engage in mischief than adults. *Raymond v. Paradise Unified School Dist.*, 218 Cal. App. 2d 1, 10, 31 Cal. Rptr. 847, 853 (1963). High school students, however, are more capable of self control than grammar school students and consequently less supervision may be required. *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 748, 470 P.2d 360, 364, 87 Cal. Rptr. 376, 380 (1970).

The School District's Response

Bolstered by the amicus curiae voice of thirty-seven school and community college districts,⁴⁰ Manhattan Beach City School District entreated the supreme court to uphold dismissal of the Hoyems' complaint on both legal and policy grounds.

Arguing against a duty to prevent students from leaving campus, the district stressed both the importance of the situs of the injury and the status of the victim. It asserted that the off-campus situs of the injury relieved it of a duty, Michael having voluntarily left the campus and there having been no subsequent undertaking by the district to protect or to provide transportation for him.⁴¹ A contrary rule would burden schools with a limitless duty to ensure student safety along the varied routes children travel to and from school.⁴² To underscore Michael's truant status, the district emphasized case law precluding liability for off-campus injuries arising from non-school-related activities.⁴³ Because truancy is by definition a voluntary activity unconnected to any school purpose, the district argued it was absolved from liability.⁴⁴

The policy arguments offered against the imposition of liability had a common and effusive theme: an adverse ruling would force schools to implement new procedures and policies which would detrimentally effect quality of education in California. For example, the district and the amicus curiae insisted that public schools would have to be made physically "truant proof"⁴⁵ and that the burden of such an undertaking would be staggering. They contended that the traditional role and duty of staff members would be diverted from teaching to guarding and monitoring.⁴⁶ They also predicted that the impossibility of maintaining visual contact with all students would require a reduction in the size of campuses, destroying students' sense of freedom and openness.⁴⁷ It was further argued that many unique educational programs which require students to move within or leave the campus during the school day could never be adequately "truant-proofed" and would therefore have to be eliminated.⁴⁸ Additionally, the district

40. Brief of Amicus Curiae at 2-3. The brief of the amicus curiae was filed by the County Counsel of Los Angeles County.

41. Opposition to Petition For Hearing at 3-4 (citing *Kerwin v. County of San Mateo*, 176 Cal. App. 304, 1 Cal. Rptr. 437 (1959)). See notes 23-28 & accompanying text *supra*.

42. Opposition to Petition For Hearing at 7 (citing *Girard v. Monrovia City School Dist.*, 121 Cal. App. 2d 737, 743, 264 P.2d 115, 119 (1953)).

43. See note 25 & accompanying text *supra*.

44. Opposition to Petition for Hearing at 4.

45. *Id.* at 8.

46. *Id.*

47. Brief of Amicus Curiae at 6-8.

48. *Id.* at 12. It was noted in the amicus curiae brief that students in junior and senior

maintained that because truancy is not one of the statutory bases for student suspension, schools would be saddled with the frustrating responsibility of protecting persons over whom they have no effective control.⁴⁹

As an alternative to "truant-proofing," the district argued, some schools would be forced to purchase insurance covering truants. They further submitted that pursuance of this alternative would precipitate a liability insurance crisis at a time when not only are schools facing unprecedented financial strains, but governmental entities are finding it increasingly difficult to procure adequate insurance protection at any price.⁵⁰

The Hoyem Decision: Liability May Incur for Injuries to Truants

In a majority opinion written by Justice Tobriner, a divided court ruled that the duty to supervise school grounds includes the obligation to exercise due care to ensure that students do not leave without permission during the school day.⁵¹ Justice Tobriner relied on *Dailey v. Los Angeles Unified School District*,⁵² a case arising out of an injury sustained during a student fist fight on school premises and which fell squarely within the law of school ground supervision. The plaintiffs in both *Dailey* and *Hoyem* had alleged that the duty to provide reasonable supervision on campus had been breached.⁵³ The *Dailey* court ruled that supervisory duties included the duty to enforce any rules or regulations necessary for pupil safety.⁵⁴ The *Hoyem* court found such a regulation in a section of the California Administrative Code⁵⁵ prohibiting unauthorized student departures prior to termination of the school day. Justice Tobriner had "no doubt that this rule is at least in part for the pupils' protection, and that the school authorities therefore

high schools traditionally, and elementary level students increasingly, move within the campus from one class to the next during the school day. Also allegedly threatened were vocational training programs that require students to leave school for a portion of the day to attend occupational classes. *Id.*

49. *Id.* at 8. Truancy is not among those offenses for which a pupil in a California public school can be suspended or expelled. CAL. EDUC. CODE § 48900 (West 1978).

50. Brief of Amicus Curiae at 15. The amicus brief cited to "A Report of the Liability and Property Insurance Crises in Los Angeles Public School Districts" published by the County Superintendent's Office in August 1977. This report allegedly chronicles a crisis in the insurance business caused by the alarming underwriting losses for liability lines. As a result companies were attempting to eliminate all political entities from their books partly through a three year premium increase of 400%. *Id.* at 16.

51. 22 Cal. 3d at 514, 585 P.2d at 854, 150 Cal. Rptr. at 4.

52. 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970).

53. 22 Cal. 3d at 513-14, 585 P.2d at 854, 150 Cal. Rptr. at 4. See notes 32-33 & accompanying text *supra*.

54. 2 Cal. 3d at 747, 470 P.2d at 363, 87 Cal. Rptr. at 379.

55. Tit. 5, CAL. ADMIN. CODE § 303 (1977).

bore the duty to exercise ordinary care to enforce the rule.”⁵⁶

In examining the relevance of the situs of the injury, Justice Tobriner branded as “misplaced” the district’s contention that the mere fact of an off-campus situs barred recovery.⁵⁷ He noted that in a previous California decision, *Satariano v. Sleight*,⁵⁸ the court had recognized the claim of a student injured while crossing a public street located between the school gymnasium and the athletic field. *Satariano* illustrated that situs in itself was insufficient to defeat recovery because in some circumstances school authorities must supervise students who are off school premises.⁵⁹ He reasoned further, however, that because the present allegations concerned a duty owed to the plaintiff while he was *on school premises*, this case was not the occasion on which to determine the scope of the off-campus duty recognized in *Satariano*.⁶⁰ According to Justice Tobriner, the duty found in *Hoyem* was not a new duty, nor was it an extension of the *Dailey* rule; the court was simply reaffirming an obligation of due care owed while students are on school grounds.⁶¹ This duty, Justice Tobriner reasoned, was applicable to students who, although voluntarily enrolled in summer sessions, were compelled to attend classes.⁶² Moreover, this duty was held not to be obviated during the summer, Justice Tobriner reasoning that parents “can legitimately expect adequate supervision”⁶³ during school hours.

The *Hoyem* opinion did concede that by enacting section 44808 of the Education Code the legislature had intended to limit school responsibility for the safety of pupils when not on school property.⁶⁴ Justice Tobriner noted, however, that the statute’s terms and legislative history evidenced an intention not to apply its limitation on duty to the instant facts. While the statute generally absolves the school of off-campus liability, it withdraws this protection where the school “has failed to exercise reasonable care under the circumstances.”⁶⁵ He emphasized that the Hoyems had brought themselves within this exception by alleging the lack of reasonable supervision to prevent unauthorized student de-

56. 22 Cal. 3d at 514, 585 P.2d at 854, 150 Cal. Rptr. at 4.

57. *Id.* at 515, 585 P.2d at 855, 150 Cal. Rptr. at 5.

58. 54 Cal. App. 2d 278, 129 P.2d 35 (1942).

59. 22 Cal. 3d at 515, 585 P.2d at 855, 150 Cal. Rptr. at 5.

60. *Id.*

61. *Id.* at 515-16, 585 P.2d at 855, 150 Cal. Rptr. at 5. To further support the finding that truants may recover for negligent supervision Justice Tobriner cited *Bryant v. United States*, 565 F.2d 650 (10th Cir. 1977), in which federal authorities running a boarding school were held liable for negligently failing to prevent three students from leaving school grounds without permission during a severe snowstorm.

62. 22 Cal. 3d at 519, 585 P.2d at 857, 150 Cal. Rptr. at 7.

63. *Id.* at 519-20, 585 P.2d at 857, 150 Cal. Rptr. at 7.

64. CAL. EDUC. CODE § 44808 (West 1978). See notes 25-27 & accompanying text *supra*.

65. 22 Cal. 3d at 517, 585 P.2d at 856, 150 Cal. Rptr. at 6.

partures.⁶⁶ Because the statute is based upon problems of the duty owed to students travelling to and from school before or after school hours⁶⁷ or who are engaging in school-related activities off school property,⁶⁸ he found that it in no way restricts the school district's duty to supervise students on school premises during school hours.⁶⁹

In rejecting the policy arguments advanced by the defendant and amicus districts, Justice Tobriner described their fears as "clearly unwarranted."⁷⁰ The majority findings required "ordinary care not fortresses; schools must be reasonably supervised, not truant-proof."⁷¹ Justice Tobriner suggested, however, that a jury could still reduce an injured truant's award under principles of comparative negligence.⁷²

Finally, in ruling that the question of proximate cause was a jury question, Justice Tobriner held that Michael Hoyem's departure was not unforeseeable as a matter of law:

Since at least the days of Huck Finn and Tom Sawyer, however, adults have been well aware that children are often tempted to wander off from school, and a jury might well conclude that the defendants could have reasonably foreseen that this temptation might be especially strong in the summer session when a student's friends might not be in school. Indeed, the duty to supervise school children is imposed in large part in recognition of the fact that, without such supervision, students will not always conduct themselves in accordance with school rules or as safely as they ought to.⁷³

He concluded that the mere involvement of the negligent motorist was not in itself sufficient to absolve the district of liability once it was shown that it was negligent in discharging its supervisory duties.⁷⁴

Justice Clark in dissent accused the majority of making a political decision to set up school districts as absolute insurers of truant safety.⁷⁵ These sentiments reflected those espoused by the defendant and amicus school districts.⁷⁶ He charged that the alternatives presented to the

66. *Id.*

67. *Kerwin v. County of San Mateo*, 176 Cal. App. 2d 304, 1 Cal. Rptr. 437 (1959); *Girard v. Monrovia City School Dist.*, 121 Cal. App. 2d 737, 264 P.2d 115 (1953).

68. *Castro v. Los Angeles Bd. of Educ.*, 54 Cal. App. 3d 232, 126 Cal. Rptr. 537 (1976).

69. 22 Cal. 3d at 518 n.3, 585 P.2d at 857, 150 Cal. Rptr. at 7.

70. *Id.* at 519, 585 P.2d at 857, 150 Cal. Rptr. at 7.

71. *Id.*

72. *Id.* at 519 n.4, 585 P.2d at 857, 150 Cal. Rptr. at 7.

73. *Id.* at 520, 585 P.2d at 858, 150 Cal. Rptr. at 8.

74. *Id.* at 521, 585 P.2d at 858, 150 Cal. Rptr. at 8.

75. Justice Clark accused the majority of "paying only lip service" to the rule established in *Taylor v. Oakland Scavenger Co.*, 12 Cal. 2d 310, 317, 83 P.2d 948, 951 (1938), that public school districts are not the insurers of pupil safety. Later he was less suggestive and more explicit: "[t]here is little question the majority decision is grounded on a policy determination that, in their view, yet another element of society should be afforded an insured's protection against mishap." 22 Cal. 3d at 525, 585 P.2d at 861, 150 Cal. Rptr. at 11.

76. See notes 45-50 & accompanying text *supra*.

school districts, increased security in an attempt to "truant-proof" or the purchase of more insurance, would either send the districts into bankruptcy⁷⁷ or create a "concentration camp"-like atmosphere inimical to students' interest in quality education.⁷⁸ He concluded that the unforeseeability of the injury, the remote connection between injury and negligence, the lack of any moral blame for the school in its attempt to fulfill its educational role and the potential of insurmountable financial burdens should have compelled the exercise of restraint in imposing liability.⁷⁹

Justice Richardson concurred in Justice Clark's dissent, also phrasing the duty issue as ultimately a policy determination.⁸⁰ Among the factors he found favoring the district were the "fundamental" role of education, the inevitable risk truancy presents to school operations, the financial burden of insuring against this "new" liability, and the lack of any moral culpability.⁸¹ Justice Richardson also criticized the majority for failing to define clearly the scope of a school district's duty to supervise, suggesting the next case may involve a "truant who without anyone's permission or knowledge deliberately slipped away from school, hopped a freight train and was injured when he fell off a car four days later in Duluth, Minnesota."⁸² He argued that when the student leaves the schoolyard on a "lark" the school's liability should not, "like a shadow, follow the youngster as he wanders around town."⁸³ Such a limitation, he asserted, had been intended by the legislature when it enacted section 44808 of the Education Code.⁸⁴

Hoyem and the Modern Concept of Duty

The majority denied that its decision extended previously existing law or created a new definition of duty. Rather, it emphasized that the court had merely reaffirmed a recognized obligation of due care.⁸⁵ These statements, however, do little to conceal the fundamental role that the modern concept of duty demanded in *Hoyem*. The liability of school districts for injuries to truants presented a question novel to California tort law. The issue engendered considerable debate over the

77. A result which he argued would be hastened by the adoption of Proposition 13, a ballot initiative reducing state property taxes and thereby limiting state revenue sources, in the 1978 state primary election. 22 Cal. 3d at 524-25, 585 P.2d at 861, 150 Cal. Rptr. at 11. See notes 166-67 & accompanying text *infra*.

78. 22 Cal. 3d at 525, 585 P.2d at 861, 150 Cal. Rptr. at 11.

79. *Id.* at 526-27, 585 P.2d at 862, 150 Cal. Rptr. at 12.

80. *Id.* at 527, 585 P.2d at 862, 150 Cal. Rptr. at 12.

81. *Id.* at 527, 585 P.2d at 863, 150 Cal. Rptr. at 13.

82. *Id.* at 528, 585 P.2d at 863, 150 Cal. Rptr. at 13.

83. *Id.*

84. *Id.*

85. See notes 61-63 & accompanying text *supra*.

relevance of victim status and injury situs, the implications that a finding of liability would have on broad interests, and the efficacy of judicial attempts to resolve such problems. These issues are at the heart of the modern approach to duty and were central to the *Hoyem* decision. The remainder of this Note examines the trend in modern tort law to expand and simplify the concept of duty in an attempt to permit the jury to decide most issues of liability. The factors influencing the *Hoyem* court to adhere to or depart from this trend are identified. This section concludes that the problems of truancy and negligent supervision defy rational adjudication and that, therefore, the California Supreme Court should have retreated from its trends of expansion and simplification by establishing a rule of limited duty, thus delegating the issue of the need for a more extensive duty to the legislature.

The Evolving Concept of Duty in Modern Tort Law

A "duty" is a legally-imposed obligation arising by virtue of some relationship between two parties requiring one party to conform to a standard of care for the benefit or protection of the other.⁸⁶ The rules of duty, in the common law tradition, are primarily judge-made⁸⁷ and generally reflect the social and political environment existing at the time of any decision.⁸⁸ Over the last century duty has been dramatically influenced by the environment and has undergone a shift from a complex doctrine to a simplified ideal. During the nineteenth century, duty was a mechanistic concept developed to restrict the number of causes of action available to an injured plaintiff.⁸⁹ This approach was part of a broader trend toward easing the adjudicability of complex claims and minimizing the number of worker's suits brought during the early years of the industrial revolution.⁹⁰ In keeping with the period's new awareness of individual "free will," this limitation on duty ensured that liability would be imposed only where there was legal "fault" and provided citizens with an incentive to ensure their own safety.⁹¹ Even

86. J. FLEMING, INTRODUCTION TO THE LAW OF TORTS 44 (1967); F. HARPER & F. JAMES, THE LAW OF TORTS 1015-24 (1956); W. PROSSER, THE LAW OF TORTS 324-26 (4th ed. 1971); Seavy, *Principles of Torts*, in ESSAYS ON THE LAW OF TORTS 5-6, (1964).

87. See Green, *The Thrust of Tort Law, Part I: The Influence of Environment*, 64 W. VA. L. REV. 1, 1 (1961); Horvitz, *Justice Tobriner's Tort Decisions: A Re-Affirmation of the Common Law Process*, 29 HASTINGS L.J. 167, 167 (1977) [hereinafter cited as Horvitz].

88. See Green, *The Thrust of Tort Law, Part I: The Influence of Environment*, 64 W. VA. L. REV. 1 (1961); 1 F. HARPER & F. JAMES, THE LAW OF TORTS xxvii (1956).

89. Tobriner, *The Changing Concept of Duty in the Law of Torts*, CAL. TRIAL LAW. J., Winter/Spring, 1970, at 17, 18 [hereinafter cited as Tobriner].

90. See *Dillon v. Legg*, 68 Cal. 2d 728, 734-35, 441 P.2d 912, 916-17, 69 Cal. Rptr. 72, 76-77 (1968); Sulnick, *A Political Perspective of Tort Law*, 7 LOY. L.A. L. REV. 410, 415 (1974); Tobriner, *supra* note 89, at 18.

91. The development of fault as a coextensive element of duty reflected this period's emphasis on individualism. The new political liberalism fostered this value on free will in

if a duty were found to exist, negligence actions were still subject to the restrictive and subtle refinements of contributory negligence, last clear chance, assumption of the risk, and the fellow-servant rule.⁹² Moreover, judicial determinations of liability not only relied heavily upon such restrictive doctrine,⁹³ but rarely addressed underlying issues of social policy.⁹⁴

Modern courts, however, recognizing the increased complexity, collectivization, and risk of injury in today's society,⁹⁵ have begun to openly infuse socio-economic considerations into the concept of duty, attempting to achieve a delicate balance of broad values.⁹⁶ While judges in the past weighed social policies when drawing the line between liability and nonliability,⁹⁷ judges today are more willing to openly announce that their task is inherently political⁹⁸ and that social

an attempt to rely less upon the hierarchical character of relationships which pervaded medieval society and more upon mobility and individual initiative both in politics and in the marketplace. See W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 119-20, 161-63 (2d ed. 1972). See generally Leflar, *Negligence in Name Only*, 27 N.Y.U.L. REV. 564, 564-65 (1952); Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247, 1249-51 (1967).

"The emergence of 'fault' as the principal basis of tort liability during the nineteenth century may be seen as part of the broader legal development which Sir Henry Maine characterized as a 'movement from Status to Contract.'" Rintala, *The Supreme Court of California, 1968-1969—Foreward: "Status" Concepts in the Law of Torts*, 58 CALIF. L. REV. 80, 80 (1970) [hereinafter cited as Rintala]. Contract, like the new concept of negligence, signified unfettered choice. It focused not on relationships, hierarchies or status, but on the implications of individual action and provided legal redress only when a performance or duty was owed. *Id.* at 83-94.

92. See J. FLEMING, *INTRODUCTION TO THE LAW OF TORTS* 138-41, 143-47 (1967); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1191-92, 1197-99 (1956); W. PROSSER, *THE LAW OF TORTS* 418 (4th ed. 1971).

93. See, e.g., Rintala, *supra* note 91.

94. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 762 (1956) (assumption that plaintiff and defendant alone were involved "focused attention on the moral quality of the conduct of the individual participants in the accident"); cf. Cooperrider, *A Comment on the Law of Torts*, 56 MICH. L. REV. 1291, 1311 (1958): "The judges of an earlier day were modest in the claims they were willing to make for the law of torts. They did not conceive that it was their mission to sally forth to remedy all the ills of society armed only with the money judgment. There were areas of conflict between persons where, by reason of the limitations of their techniques, they frankly feared to tread, recognizing the danger that their interference, in the long run and in the generality of cases, would work more harm than good. [T]o do justice according to law between plaintiff and defendant, they worked out a system of checks and balances between judge and jury so that that objective could at least be approached."

95. Horvitz, *supra* note 87, at 167-68 (citing several articles written by Justice Tobriner). See also J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 187-205 (3d ed. rev. 1978).

96. Tobriner, *supra* note 89, at 22.

97. Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 258 (1929). See also Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76 (1928).

98. See, e.g., *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 446-47, 563 P.2d 858,

factors will predominate in their decision making.⁹⁹

Three identifiable groups of authorities have commented upon this new expression of duty.¹⁰⁰ Generally, they may be categorized by their emphasis on (1) social values, (2) economic theory, or (3) political conflict as providing the basis for a finding of liability.

Most writers have noted a decided shift to a "victim-oriented" approach concerned primarily with compensating the plaintiff which in turn reduces the emphasis placed upon the fault of the defendant.¹⁰¹ This trend is due to the recognition that in the past the law too often distinguished between compensable and noncompensable injuries on the basis of intricate and overly specific doctrines of duty, whereas in terms of social cost the injuries of all victims are measured by the same standard.¹⁰² Thus, the courts have developed a distaste for fixed rules of duty that prevent a jury from deciding a case,¹⁰³ preferring a more general standard of care that affords a case-by-case approach to the problem of compensation.¹⁰⁴ As a corollary to emphasis on the victim's injury, the importance of the plaintiff's "reasonable expectation" of safety has been stressed.¹⁰⁵ This emphasis on expectation arises out of a policy determination: the public has a right to expect a certain performance or standard of conduct from a defendant because of the de-

862, 138 Cal. Rptr. 302, 306 (1977) (Tobriner, J.) (quoting from *Suter v. Leonard*, 45 Cal. App. 3d 744, 746, 120 Cal. Rptr. 110, 111 (1975)).

99. W. PROSSER, *THE LAW OF TORTS* 15 (4th ed. 1971). See *Raymond v. Paradise Unified School Dist.*, 218 Cal. App. 2d 1, 8-9, 31 Cal. Rptr. 847, 851-52 (1963).

100. See Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 522-23 (1976) [hereinafter cited as Henderson].

101. Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815 (1967); Horvitz, *supra* note 87, at 168-71; Rabin, *Some Thoughts on Tort Law from a Sociopolitical Perspective*, 1969 WIS. L. REV. 51, 68-70. But cf. Green, *The Thrust of Tort Law, Part I: The Influence of Environment*, 64 W. VA. L. REV. 1, 3-4 (1961) (goal of recompense has always been central tenet of tort law). The fault concept has been described as a "legal lottery" of complex rules into which innocent victims are thrust, unable to proceed with the assurance that their case will not be dismissed because of fixed rules of law. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 785-87 (1967).

102. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 774 (1967).

103. *Id.* at 786.

104. See generally James, *Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 AM. TRIAL LAW. L.J. 360, 360-61 (1958). Professor Cooperrider, a critic of this change, has identified in addition to the pressures for increased compensation, an "aesthetic urge" in modern tort law to reorganize specific rules of duty in accordance with the broad generalizations of "reasonableness" and "foreseeability." Cooperrider, *Comment on The Law of Torts*, 56 MICH. L. REV. 1291, 1309-10 (1958). Similarly, Professor Henderson has described the repugnance among courts and scholars toward formality in doctrine as a reflection of a trend of "purification" of the negligence concept. Henderson, *supra* note 100, at 483, 501.

105. Horvitz, *supra* note 87, at 170; Tobriner, *supra* note 89 at 18, 22.

fendant's status as, for example, a landlord, manufacturer, or driver of an automobile.¹⁰⁶

Another group of scholars emphasizes economic theory as the primary basis for apportioning liability.¹⁰⁷ This approach may stress the importance of reaching acceptable accident-safety levels or efficient loss minimization,¹⁰⁸ or it may focus on the defendant's ability to absorb and spread the risk of loss arising from its activities.¹⁰⁹

A third group of commentators, a decided minority, sees the expanding notion of duty as a political tool. One writer, for instance, argues that expanding the number of causes of action and increasing the size of the class of plaintiffs do not illustrate an effort toward efficient loss allocation and compensation, but signify only an attempt to control and frustrate institutional behavior.¹¹⁰ Similarly, others contend that the new flexibility can be manipulated to ensure that those who are entrusted with power act "in a civilized manner."¹¹¹

These various approaches to the question of duty may not always be categorized as distinctly as the above groupings would indicate. Most writers agree that the process of incorporating policy considerations into duty has led to a more flexible concept that enables courts to weigh a blend of socio-economic interests.¹¹²

106. Tobriner, *supra* note 89 at 18-21. See generally Rintala, *supra* note 91.

107. The foremost proponent of economic analysis has been Professor Calabresi. His most significant and well-known contribution is G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

108. See, e.g., Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

109. The actual theories are more complicated. Professor Calabresi theorizes that fewer social costs would imbue society if the wealthy were to pay a greater share of the accident price. Arguing that the principal functions of negligence law are compensation and reallocation of accident cost, he suggests that problems of cost avoidance should be treated in terms of activities rather than in terms of fault or careless conduct. His focus, however, is primarily upon cost reallocation; he urges that activities which cause accidents should not be abolished but should be required to more nearly reflect their social costs. To implement these theories he proposes that activities which are valueless should be subject to non-insurable tort fines; on the other hand, activities which have a social value should be allowed to operate to the extent they can pay for their accident costs. Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 713-20, 742-45 (1965). See also Ehrenzweig, *Negligence Without Fault*, 54 CALIF. L. REV. 1422 (1966).

110. Sulnick, *A Political Perspective of Tort Law*, 7 LOY. L.A. L. REV. 410, 415-17 (1974). According to Sulneck, the role of tort law is to control institutional behavior and to provide the catalyst for policy changes. This function is effectuated by forcing institutions to pay out damage awards and by "stigmatizing" their behavior as "unlawful" through media coverage of injury suits. *Id.* at 417-22.

111. See Shapo, *Changing Frontiers in Torts: Vistas for the 70's*, 22 STAN. L. REV. 330, 335 (1970).

112. Most writers commenting upon this flexibility simply refer to the broadening of liability which has resulted from a weighing of policy. They do not explicitly single out "duty" as the focal point of change in modern tort law. See, e.g., Green, *The Thrust of Tort Law, Part I: The Influence of Environment*, 64 WEST VA. L. REV. 1, 27 (1961). See also W.

This mixed emphasis is evident in the well-known California Supreme Court decisions of *Dillon v. Legg*,¹¹³ *Vesely v. Sager*¹¹⁴ and *Rowland v. Christian*.¹¹⁵ These cases are relevant here for another reason: each, much like *Hoyem*, considered arguments by a defendant that the situs of the injury and the status of the victim as a matter of law either precluded or severely limited the duty owed to the plaintiff. The justices in response established the predominate trend in modern California tort law by rejecting these contentions as overly rigid and applying a simplified rule of duty to effectuate the social and economic goals of victim compensation, efficient loss minimization and allocation, and increased responsibility for defendants.

In *Dillon* the majority per Justice Tobriner established a cause of action for emotional shock and resulting physical injury on behalf of a mother who, although outside the "zone of danger" and not suffering a physical impact, witnessed the defendant driver negligently strike and kill her child.¹¹⁶ The majority discarded the common law rule that injury situs precluded duty, characterizing it as an "immunizing," overly complex concept designed solely to defeat claims. *Dillon* thus established that the two crucial elements of duty are foreseeability and the plaintiff's expectation of safety.¹¹⁷ The case is also "victim-oriented" in its emphasis on compensation of injury as a significant goal of tort law.¹¹⁸ This view is evidenced in the court's emphasis on the nature of the plaintiff's injury and the community values favoring her recovery.¹¹⁹

In a subsequent decision, *Vesely v. Sager*,¹²⁰ the California court imposed liability on a bar owner who provided alcohol to a patron who later caused injury to a third person. Chief Justice Wright abrogated the common law rule, based upon victim status, that the owner of a

PROSSER, LAW OF TORTS 16-23 (4th ed. 1971); 2 F. HARPER & F. JAMES, THE LAW OF TORTS 742-43 (1956); Rabin, *Some Thoughts on Tort Law From a Sociopolitical Perspective*, 1969 WIS. L. REV. 51, 62. Nevertheless, the factors which they emphasize as providing the impetus for the expansion of negligence are exactly those which the California Supreme Court analyzed in determining new questions of duty. See, e.g., *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975); *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

113. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

114. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

115. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

116. 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

117. *Id.* at 734-36, 739-40, 441 P.2d at 916-17, 919-20, 69 Cal. Rptr. at 76-77, 79-80; Horvitz, *supra* note 95, at 169-70.

118. See Horvitz, *supra* note 87, at 169-70.

119. 68 Cal. 2d at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74. See also *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975) (foreseeability, history, community morals, justice and convenience influence a finding of duty).

120. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

liquor-serving establishment could not be liable to such third persons as a matter of law.¹²¹ The holding in *Vesely* was based explicitly upon the superior ability of the defendant to evaluate the dangerousness of the situation and to prevent injury,¹²² thus enabling loss minimization, and implicitly upon the defendant owner's ability to spread the risk of injury.¹²³

Neither *Dillon* nor *Vesely* surpassed *Rowland v. Christian*¹²⁴ in providing a comprehensive modern treatment of the problem of duty. *Rowland*, decided in the same year as *Dillon*, is a classic illustration of how the court has made duty more flexible and simplified in the face of restrictive situs and status doctrines. Justice Peters led the court in concluding that the common law classifications of persons coming upon land as trespassers, licensees, or invitees were a "semantic morass" of confused and conflicting doctrines,¹²⁵ unjustified in a modern society that placed great value upon "limb and life." These fixed designations were discarded in favor of a single rule of reasonable care toward all persons coming upon land.¹²⁶ Justice Peters listed several factors that could be considered in determining the question of duty:¹²⁷ foreseeabil-

121. 5 Cal. 3d at 159-64, 486 P.2d at 155-59, 95 Cal. Rptr. at 627-31. The common law doctrine held that furnishing alcoholic beverages was not the proximate cause of the third party's injuries; the supreme court, however, observed that the issue in *Vesely* was not one of proximate cause but rather one of duty. *Id.*

122. Horvitz, *supra* note 87, at 174.

123. Horvitz, *supra* note 87, at 174. Later, in *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), the tavern-owner liability established in *Vesely* was extended to social hosts or non-commercial entities who furnish alcoholic beverages to intoxicated persons under circumstances that create a reasonably foreseeable risk of harm to others. The fact that *Coulter* imposed liability on a non-commercial defendant does not, however, diminish the relevance that a defendant's risk-spreading ability commands in deciding the question of duty. In *Coulter*, Justice Richardson applied the *Rowland* elements of duty and assumed that liability insurance would be available to protect social hosts. He also recognized that the burden on a non-commercial defendant would be significant; however, in balancing this burden against the nature of the injury he concluded that the latter, because of the potential for serious harm, deserved more weight. *Id.* at 153-54, 577 P.2d at 674-75, 145 Cal. Rptr. at 539-40. The California Legislature has abrogated the holdings in *Vesely* and *Coulter* by providing that furnishers of alcohol shall not be liable for the negligent acts of intoxicated persons whom they have served. 1978 Cal. Legis. Serv., ch. 929. (amending CAL. BUS. & PROF. CODE § 25602, CAL. CIV. CODE § 1714).

124. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

125. *Id.* at 116, 443 P.2d at 566, 70 Cal. Rptr. at 102 (quoting *Kermarec v. Compagnie Generale*, 358 U.S. 625, 630-31 (1959)).

126. *Id.* at 118-19, 443 P.2d at 568, 70 Cal. Rptr. at 104. The essence of the decision in *Rowland* lies in its recognition that the common law rules based upon the status of the victim "obscured" the value that is placed upon human safety and prevented courts from compensating injury. See *id.* at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104.

127. *Id.* at 113, 443 P.2d at 564, 70 Cal. Rptr. at 100. Justice Peters noted that this balancing should be engaged in to determine if there is some public policy "clearly" supporting a departure from the general rule that all persons owe a duty of reasonable care to prevent others from being injured. *Id.*

ity of injury; the degree of certainty that the plaintiff suffered harm; the moral culpability of the defendant; the closeness of the connection between the defendant's conduct and the injury; the policy of preventing future harm; the burden on the defendant and the community; and the availability of insurance. The analytical relationship among these elements was left unclear by the *Rowland* court, and no subsequent decision has attempted to order them in terms of proper weight or value.¹²⁸ This ambiguity was probably intentional; the justices' purpose being only to illuminate some of the components of duty.¹²⁹ As a result, courts are free in future decisions to fashion a balance appropriate for the social and economic context of each case.¹³⁰

The central themes arising from these cases are important to delineate so that the trend preceding *Hoyem* may be understood. Generally the court has become more confident in its ability to adjudicate diverse claims by expanding and simplifying duty. Consequently, increasingly heavier burdens are imposed on defendants. The predominant tool of analysis has been a balancing of disparate policy considerations on a case-by-case approach, the court seeking a unified rule of potential liability for nearly any harm caused by unreasonable conduct.¹³¹ The two major determinants of "unreasonableness" are foreseeability and the plaintiff's expectation that the defendant will act with ordinary care.¹³² Exactly what will give content to an injured party's expectations in a particular case is not clear. *Rowland*¹³³ sketches an outline that may be filled in on an ad hoc basis dependent upon the type of activity in which the defendant engages, the ability to prevent harm, and the capacity to absorb loss.¹³⁴ The trend toward providing compensation for a greater variety of injuries and toward finding more efficient methods of loss-allocation also has played a significant role.¹³⁵

The most important theme to note is that the pressures exerted by the goals of a single rule of reasonableness, adequacy in compensation, efficient loss-allocation, prevention of injury and increased responsibility placed upon defendants apparently have made the California court uncomfortable with fixed rules of duty such as those based upon victim status and injury situs. As a result, where the opportunity has been

128. CALIFORNIA CITIZENS' COMMISSION ON TORT REFORM, RIGHTING THE LIABILITY BALANCE 58-59 (1977).

129. *Id.*

130. *Id.*; Tobriner, *supra* note 89, at 22.

131. See Tobriner, *supra* note 89; notes 113-130 & accompanying text.

132. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1018 (1956); Tobriner, *supra* note 89 at 17, 22; Horvitz, *supra* note 87, at 168, 170.

133. *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). See notes 124-30 & accompanying text *supra*.

134. See notes 105-06, 107-09, 120-23 & accompanying text *supra*.

135. See notes 101-04, 107-09, 116-19 & accompanying text *supra*.

presented, specificity in negligence doctrine has been abrogated or rejected as claim defeating and anachronistic¹³⁶ so that the trier of fact may decide the case guided by the broad principle of reasonableness.

Hoyem and the Duty Balance

Hoyem is consistent with the California Supreme Court's trend toward simplification and expansion of the concept of duty. The school district attempted to counter this trend by stressing that Michael was truant and that the injury occurred off-campus. The court rejected these issues as irrelevant¹³⁷ and thus reaffirmed its dissatisfaction with specificity in negligence doctrine. A number of other factors, some of which were not explicitly discussed by Justice Tobriner, probably led the majority toward this stance: foreseeability, the expectations of parents, the nature of the district's position in society as the employer of educators and supervisors of young children, the overriding goals of compensation for a wider variety of injuries and effective loss prevention, and the trend toward imposing heavier obligations upon defendants. The pressures exerted by these factors resulted in rejection of the fixed doctrine offered by the school district and the embracing of a principle of reasonable supervision determined on a case-by-case basis.

Hoyem, therefore, is consistent with the trend in California tort law. The decision embodies the search for a simplified approach to duty in the form of a unified rule of liability. Moreover, notwithstanding the issue of adjudicability raised by the dissenting justices,¹³⁸ the trier of fact was delegated the task of resolving the question of liability, guided only by the undefinable criterion of reasonableness.¹³⁹

Application of the modern concept of duty in this manner to the problem of truancy and schoolyard supervision constitutes a simplistic approach to a complex problem. The question of school district liability for truant injuries presents complicated problems involving broad policy questions. The remainder of this section examines the *Hoyem* "duty balance", a weighing of disparate factors common to the modern approach to duty. The purpose is twofold: illustration of the limitless and entangling nature of the truancy issue in *Hoyem* and expansion upon the factors influencing the supreme court to follow or depart from

136. The supreme court found the common law doctrine rejected in *Dillon, Rowland* and *Vesely* to be outmoded in light of modern needs. See notes 113-130 & accompanying text *supra*. Other California supreme court decisions have similarly eroded and labeled common law doctrine as anachronistic. See, e.g., *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (minor's negligence action against parent); *Muskopf v. Coming Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (governmental immunity from tort liability).

137. See notes 57-60 & accompanying text *supra*.

138. See note 75 & accompanying text *supra*.

139. See note 19 & accompanying text *supra*.

its trend in deciding duty questions. The factors that swayed the court to adhere to its trend of simplification and expansion are considered first. These include expectations of safety, ability to prevent harm, judicial desire for theoretical consistency, workability of a rule of liability, and the unique societal role of schools.

Parental expectations regarding the measures that school authorities should take to ensure the safety of children delivered to their care played a key role in *Hoyem*. Parents entrust school authorities with their children expecting that the school will exercise the degree of care compatible with the abilities and experience of young children.¹⁴⁰ In fact, Justice Tobriner noted that parents who enroll their children in school can "legitimately expect adequate supervision."¹⁴¹ This trust is an aspect of the traditional obligation of schools to both protect children and to instruct them on principles of safe conduct.¹⁴² Today as many urban schools experience increased enrollment, this obligation has become even more essential. The courts of New York, for example, have spoken of the "high standard of supervision and care . . . [which] should be imposed upon principals and teachers. Parents do not send their children to school to be returned to them maimed because of the absence of the proper supervision or the abandonment of supervision."¹⁴³

The superior ability of the school authorities, much like the driver of the car, the landowner, and the bar owner in *Rowland, Dillon* and *Vesely*, to evaluate the dangers, and to prevent the plaintiff's injuries and thus enable loss minimization also figured significantly in *Hoyem's* continuation of the duty trend.¹⁴⁴ The district was in superior position to stop Michael Hoyem from departing on his summer lark, to foresee dangers on nearby streets, and to determine the necessity for and extent of supervision. Moreover, when Michael arrived at school they were responsible to meet a duty of care to protect his physical safety.

A third reason the court continued its trend toward a broad role of reasonableness was a desire for theoretical consistency.¹⁴⁵ The district's assertion that duty ceased as a matter of law once Michael left the schoolyard¹⁴⁶ could be described as a step backward in this trend, which if extended to its logical extreme would impede a "victim-oriented" approach to the problem of compensation and might reduce incentive to prevent loss. For example, under this rule the district would

140. See, e.g., *Satariano v. Sleight*, 54 Cal. App. 2d 278, 284, 129 P.2d 35, 39 (1942).

141. 22 Cal. 3d at 519, 585 P.2d at 857, 150 Cal. Rptr. at 7.

142. For a codification of this principle see CAL. EDUC. CODE § 44807 (West 1978).

143. *Feuerstein v. Board of Educ.*, 202 N.Y.S.2d 524, 528 (1960).

144. Horvitz, *supra* note 95, at 171-74. See notes 113-30 & accompanying text *supra*.

145. See note 136 & accompanying text *supra*.

146. See notes 41-44 & accompanying text *supra*.

be relieved of liability even if a supervisor made no effort to prevent a pupil from running off the grounds and into the path of an oncoming car. To limit duty in this manner would only return to the approach taken prior to *Dillon* and would base duty upon geography rather than foreseeability and other factual determinations.¹⁴⁷ These considerations demonstrate that the *Hoyem* court may have accorded little weight to the district's argument because of its anachronistic appearance.

The seeming workability of the reasonable supervision standard¹⁴⁸ also apparently encouraged the court to continue previous trends in the definition of duty. The rule does not impose upon a school district the role of an absolute insurer of student safety. In theory at least, reasonable supervision does not require truant-proofing. The degree of care that will discharge the duty of supervision depends upon the circumstances. In some instances, a simple warning based upon the recognition that students are apt to foresake self-protective measures would suffice to discharge the duty.¹⁴⁹ The age of the particular student would be a relevant consideration. High school students, for example, because of their relative maturity and alleged ability to recognize danger would require less supervision than elementary students.¹⁵⁰ On other occasions, when school authorities have knowledge of a particular student's weaknesses, greater care would be required.¹⁵¹

A striking reason why the court tipped the balance in *Hoyem* toward a continued expansion and simplification of duty is perhaps found in the court's emphasis on obligations imposed upon defendants by virtue of their "status" in society.¹⁵² The traditional role of schools has broadened recently, society now places greater value upon education.¹⁵³ Local schools are increasingly perceived as institutions that must assume enhanced responsibility. It is not surprising, therefore, that the obligation of schools to conform to accepted concepts of justice recently has been tested repeatedly.¹⁵⁴ Judicial inquiry has focused on

147. See, e.g., *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

148. *Raymond v. Paradise Unified School Dist.*, 218 Cal. App. 2d 1, 8-9, 31 Cal. Rptr. 847, 851-52 (1963).

149. See e.g., *Satariano v. Sleight*, 54 Cal. App. 2d 278, 284, 129 P.2d 35, 39 (1942).

150. See e.g., *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 748, 470 P.2d 360, 364, 87 Cal. Rptr. 376, 380 (1970).

151. See, e.g., *Rodriguez v. San Jose Unified School Dist.*, 157 Cal. App. 2d 842, 322 P.2d 70 (1958).

152. See notes 105-06, 133-34 & accompanying text *supra*.

153. Shannon, *The New Tactics Used by Plaintiffs in Imposing Their Views on, or Enforcing Their Rights Against, Public School Boards—A Commentary*, 2 J. L. & EDUC. 77, 78 (1973).

154. "Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the

nearly every aspect of school administration including race and desegregation,¹⁵⁵ constitutional rights of students¹⁵⁶ and school personnel,¹⁵⁷ methods of financing,¹⁵⁸ and educational malpractice.¹⁵⁹ This judicial involvement demonstrates that most courts acknowledge the philosophy that schools should be required to respond, both in the classroom on the playground, in a fashion commensurate with their position as institutions that must answer to modern expectations.¹⁶⁰

While the above factors present a possible basis upon which the court would continue the modern trend of expanding and simplifying the concept of duty, the considerations that support a retreat from the trend are more persuasive. This opposing view emphasizes the undesirability of imposing economic burdens upon schools, the nature of truancy, the difficulty of distinguishing fairly and consistently among the claims of truants and other students, and the effect that uncertainty in risk calculation could have on insurance coverage. These arguments implicitly suggest that *Hoyem* raised issues of great complexity, the resolution of which may have a substantial impact on education in California.¹⁶¹

The economic impact of imposing liability in *Hoyem* may be the most compelling reason for adopting a limited rule of duty. One of the essential aspects of the modern concept of duty is the superior ability of the defendant to bear and spread the risk of loss stemming from injuries caused by the activity performed or services rendered.¹⁶² This notion necessarily assumes, however, that the party required to shoulder this burden is engaged in business-for-profit.¹⁶³ Educational institu-

last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large." *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 825, 131 Cal. Rptr. 854, 861 (1976). See also Chu, *Political Efficacy: The Problems of Money, Race and Control in the Schools*, 1977 WIS. L. REV. 989.

155. See, e.g., *Vetterli v. United States Dist. Court*, 435 U.S. 1304 (1977).

156. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975).

157. See, e.g., *Palos Verdes Faculty Ass'n v. Palos Verdes Peninsula Unified School Dist.*, 21 Cal. 3d 650, 580 P.2d 1155, 147 Cal. Rptr. 359 (1978).

158. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

159. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

160. See Brubacher, *The Impact of the Courts on Higher Education*, 2 J.L. & EDUC. 267, 282 (1973); Ripps, *The Tort Liability of the Classroom Teacher*, 9 AKRON L. REV. 19, 31-32 (1975).

161. See notes 183-97 & accompanying text *infra*.

162. See notes 109, 123, 134 & accompanying text *supra*.

163. The assumption is that, in theory, liability should not be imposed because a defendant is wealthy, rather it is a matter of the defendant's capacity to bear and distribute losses as part of and incident to the costs of doing business or through insurance. W. PROSSER, THE

tions obviously are not profit-making enterprises. The courts in California have stressed that although schools do serve certain secondary goals, they essentially were created both for the benefit of children and for the benefits which imbue to parents and the community at large.¹⁶⁴ This view is an outgrowth of the traditional sentiments that the educational system is directed by a benevolently motivated desire to do "what is right."¹⁶⁵ Additionally, in terms of economic parity, the relationship between the individual and the school is more evenly balanced and thus differs significantly from that between an individual and a business entity. This balance results because schools may not soften the financial impact of litigation, employment of more personnel, or additional insurance, by distributing costs to consumer-taxpayers.¹⁶⁶ This is particularly true in the face of the current political climate of heightened budget scrutiny where demands for increased funding face arduous battles in the state legislature.¹⁶⁷

Other possible reasons for departing in *Hoyem* from the modern trends regarding duty are the general nature of truancy and the difficulties of rationally distinguishing claims of truants from the claims of

LAW OF TORTS 22-23 (4th ed. 1971); Green, *The Thrust of Tort Law, Part I: The Influence of Environment*, 64 WEST VA. L. REV. 1, 27 (1961).

164. Payroll Guar. Ass'n, Inc., v. Board of Educ., 27 Cal. 2d 197, 203, 163 P.2d 433, 436 (1945) (Traynor, J.); McGrath v. Burkhard, 131 Cal. App. 2d 367, 377, 280 P.2d 864, 871 (1955); cf. CAL. EDUC. CODE § 51004 (West 1978) (state policy to equip students with viable skills).

165. See Knickerbocker v. Redlands High School Dist., 49 Cal. App. 2d 722, 727, 122 P.2d 289, 291 (1942).

166. As Justice Clark indicated in his dissent, the efficacy of school district response to increased financial burdens has been severely limited by the passage of Proposition 13, the initiative measure adopted by the voters of California in the June 1978 Primary Election. *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal. 3d 508, 524-25, 585 P.2d 851, 861, 150 Cal. Rptr. 1, 11 (1978). This measure, commonly known as the Jarvis-Gann initiative, added article XIII A to the California Constitution. The new law alters the previous system of real property taxation and tax procedure and imposes severe limitations upon the assessment and taxing powers of state and local governments. Proposition 13 was discussed and upheld against constitutional challenge in *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

167. The decisions in educational funding are, of course, inherently political and in modern times continue to raise considerable controversy. See generally Chu, *Political Efficacy: The Problems of Money, Race and Control in the Schools*, 1977 WIS. L. REV. 989; Long, *Litigation Concerning Educational Finance*, in THE SEVENTY-SEVENTH YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION, PART I, THE COURTS AND EDUCATION 217 (1977).

The battle between lawmakers and educators is exemplified by a press conference recently held by California's State Superintendent of Public Instruction, Wilson Riles. The conference was the starting point for a massive lobbying campaign to increase financing for public schools. Riles "grimly warned" those present that unless the legislature adopted a long-term financial support program the California public school system would be closed by 1981. *San Francisco Chronicle*, Feb. 2, 1979, at 5, col. 1.

other students. Truancy presents an inevitable risk to school operation.¹⁶⁸ Given the past ingenuity, frequency, and differing motives of student attempts to engage in truancy,¹⁶⁹ it can be expected that students will continue to depart successfully from campuses in secrecy and in defiance of school rules.¹⁷⁰ That students will also continue, as they have "[s]ince . . . the days of Huck Finn and Tom Sawyer,"¹⁷¹ to engage in adventuresome and dangerous activities can also be expected.

Moreover, a finding of liability for truant injuries, despite their constant and unavoidable threat, creates an anomalous and uncertain situation by affording greater legal protection for truants than for a child lawfully on the way home from school or a child engaging in an approved off-campus activity. A child who becomes sick and leaves school with permission, participates in a field trip to a county museum, or simply rides his bike home after school hours either waives all claims against the school district or has no cause of action at all for injuries.¹⁷² A truant, however, who steals away, regardless of his purpose or destination, is not barred from recovery for injuries.

The uncertainty that results is evident when attempts are made to

168. Despite the threat of truancy, it is exceedingly difficult for school authorities to remove recidivist truants from schools. Habitual truants may not be suspended or expelled or suspended from school and must be subjected to other "alternatives." CAL. EDUC. CODE § 48900 (West 1978). Such truants must be first referred to an attendance review board. CAL. WELF. & INST. CODE § 601.1 (West 1975). It is only after the attendance review board decides that a habitual truant cannot be corrected or has failed to respond to orders that he or she can be subjected to the jurisdiction of the juvenile court and thus be adjudged a ward of the court. CAL. WELF. & INST. CODE § 601 (West 1975).

169. One study done on student attendance in general cited a number of factors influencing students to fail to attend or to leave school without permission: dislike or boredom with school, social adjustment problems, influence of friends, academic problems, and illness. OFFICE OF THE AUDITOR GENERAL, REPORT TO THE JOINT LEGISLATIVE AUDIT COMMITTEE, ATTENDANCE AND ABSENTEEISM IN CALIFORNIA SCHOOLS 22 (March 1979). Most student attendance problems, however, are not attributable to illness and result from negative attitudes toward school. See *Absenteeism: The Perpetual Problem*, THE PRACTITIONER, Oct. 1978, at 1-3 (newsletter of the National Association of Secondary School Principals).

170. There are no figures available on the number of students who arrive at school and later "cut" class or leave school grounds without permission. Perhaps due to the limits of study, most reports simply compile statistical surveys on "unexcused" absences in general and do not distinguish between absences for the entire day and those for but a portion of the day. One study, however, is significant in that by breaking high school pupil attendance in California into class periods it found that absenteeism was higher in the afternoon (19-22%) than it was in the morning (16-18%). OFFICE OF THE AUDITOR GENERAL, REPORT TO THE JOINT LEGISLATIVE AUDIT COMMITTEE, ATTENDANCE AND ABSENTEEISM IN CALIFORNIA SCHOOLS 18-20 (March 1979). The logical inference of these statistics is that on the high school level somewhere between 1-6% of the students attending morning classes will "cut" their afternoon classes.

171. *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal. 3d 508, 520, 585 P.2d 851, 858, 150 Cal. Rptr. 1, 8 (1978).

172. See notes 23-28 & accompanying text *supra*.

distinguish the claims of truants. An obvious question is whether truants who are injured after school hours would be able to recover. A truant might, for example, leave school at noon, wander around town until well after school hours and when he finally starts home, suffer injuries. In such a case he might have a cause of action and yet a student who remained on campus until the end of the school day would not. As another example, a truant might depart from school and then later return to a point near campus and join up with a friend who has lawfully terminated his or her school day. If both were injured in the same accident it is possible that the truant would be able to recover from the school while the friend would be without a remedy against the school.

While such results are unlikely, these examples do demonstrate that if the *Hoyem* court chose not to apply a rigid rule of duty to the instant facts, another court might have to resort to such a solution in a later case by precluding liability for injuries suffered by truants after school hours. If this circumstance occurred, the courts could perhaps reason that a student can no longer be truant after school hours.¹⁷³ A further anomolous result would thus be presented: a truant injured a few moments before school is terminated could state a cause of action, while a truant injured after school, possibly ten minutes later, could not. At some point the courts might have to draw a line among the claims of individual truants. The prospect of an ultimate resort to victim status in denying claims lends credence to the argument that the most clear rule, and that which avoids the disparity in remedy between truant and nontruant injuries, is one that precludes liability for all truant harm.

Another factor calling for restraint in applying modern notions of duty in *Hoyem* is that if educators are to perform their broad duties, they must have clearly defined limits regarding their responsibility to control and supervise students. Schoolyard negligence, however, is difficult to define. For example, while school authorities can not be absolute insurers of student safety,¹⁷⁴ no standards exist regarding the number of students one supervisor may adequately oversee or the minimum standard of attention that must be devoted to pupil activities.¹⁷⁵

173. This reasoning would be supported by CAL. EDUC. CODE § 48264 (West 1978) which permits authorities to arrest truants only during school hours and only within the county, city, or school district in which the school is located. The limitations on the power to arrest truants provided by this section raise further potential inconsistencies: if the court found that schools could be liable for after-hours truant injuries, schools would have no authority to take truants under control. The same inconsistent limitation would apply to truants outside the school district, city, or county boundaries.

174. *Taylor v. Oakland Scavenger Co.*, 12 Cal. 2d 310, 317, 83 P.2d 948, 951 (1938).

175. *Rodriguez v. San Jose Unified School Dist.*, 157 Cal. App. 2d 842, 848, 322 P.2d 70, 74 (1958).

The simplest formulation would be that school authorities must supervise the conduct of students at all times and enforce any rules and regulations necessary for their safety.¹⁷⁶ Applied to truancy, this means that during the school day, schools must provide sufficient supervision to prevent students from leaving campus and suffering "foreseeable" harm.¹⁷⁷

Because this standard is vague, the threat of litigation by students injured despite a school's precautions would remain. This threat might encourage schools to direct funds and manpower away from the goal of education and into safe guarding against truant injuries. Ultimately, the task of balancing a fundamental role of schools with truant protection requires the unique managerial expertise of school administrators and teachers. The standard of care proposed in *Hoyem*, however, does not recognize this skill as a factor in determining the scope of the duty to adequately supervise. Instead, the jury decides the "reasonableness" of educator's behavior¹⁷⁸ guided by the nonprofessional standard of an ordinary person entrusted with the care of school age children.¹⁷⁹

These considerations relating to budget limits, political climate, the nature of truancy, the need for certainty, and the complex role of professional administrators are all variables which must be weighed in calculating the risk of truant injury liability. The availability of insurance raises complicated questions. Whether insurance should even be placed into the balance to determine duty is still a matter into the balance to determine duty is still a matter of scholarly dispute.¹⁸⁰ Never-

176. See, e.g., *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 747, 470 P.2d 360, 363, 87 Cal. Rptr. 376, 379 (1970). See notes 52-56 & accompanying text *supra*.

177. In the absence of a specific undertaking there is no duty to supervise and prevent harm to students after school hours. See notes 23-28 & accompanying text *supra*. Truants, however, leave school grounds before the school day is over and injuries sustained after hours present complex questions. See notes 168-71 & accompanying text *supra*. It is conceivable that the courts will reason that because truants may not be restrained after school hours, CAL. EDUC. CODE § 48264 (West 1978), schools should not be responsible for their safety after school is terminated. The *Hoyem* majority, if it is ever presented with a claim arising from an after school truant injury, however, might not accept this interpretation by reason of its emphasis that the duty owed was breached on the school property *during school hours*. 22 Cal. 3d 508, 514-15, 585 P.2d 851, 854-55, 150 Cal. Rptr. 1, 4-5 (1978). Justice Clark in his dissent also believed that the rule in *Hoyem* might allow truants to recover for after hours injuries. *Id.* at 582, 585 P.2d at 863, 150 Cal. Rptr. at 13.

178. Questions relating to the adequacy and reasonableness of supervision are for the trier of fact. See note 19 & accompanying text *supra*.

179. See note 17 & accompanying text *supra*.

180. Compare Mancuso, *Fault—A Basic Requirement of Sound Public Policy*, 38 INS. COUNSEL J. 397 (1971) (concept of moral fault should be the basis of modern negligence system) with CALABRESI, *THE COSTS OF ACCIDENTS* (1970) (rational allocation of loss should be the basis of system). The heavy majority of writers, however, agrees that insurance should play a role. See, e.g., 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 764-84 (1956); W. PROSSER, *THE LAW OF TORTS* 541-70 (4th ed. 1971).

theless, the *Rowland* court did emphasize this possibility as a component of duty¹⁸¹ and the courts thus far have deemed it relevant as a justification for expanding duty.¹⁸² The difficulty of obtaining insurance has never been relied upon, however, as a reason for restricting the scope of duty in a majority opinion.¹⁸³ The possibility that schools would be victimized by a liability insurance crisis deserved consideration by the court and probably did enter into its decision. The court certainly would have had to acknowledge that insurers may be more reluctant to provide protection to schools where the risk of an adverse judgment hangs on a case-by-case determination than where it is calculable under specific doctrines that restrict the number of student injury cases decided by the jury.¹⁸⁴

Thus the problem of imposing liability for truant injuries is so interrelated with other more broad issues concerning the educational process that there are few limits on inquiry. Considerations range from local questions over the type of relationship a teacher must have with his or her pupils to the statewide issues over the purpose and politics of education. Despite the myriad factors at work, the California Supreme Court in *Hoyem* never addressed the propriety of turning away from its trends toward increased liability and conceptual simplicity in its definition of duty.¹⁸⁵ Instead it delegated the task of weighing these disparate considerations to the trier of fact. The implication here is that as the concept of duty is simplified and expanded in some instances the courts begin to in some instances address problems ill-suited to judicial resolution.

Hoyem and the Limits of Modern Duty

The *Hoyem* decision raises significant questions concerning the propriety of an expansive and simplified concept of duty regarding the liability of school officials for injuries to truants. Specifically, this devoted consistency to a wide sweep in modern liability evidenced in *Hoyem's* adoption of a rule of duty defined broadly as "reasonable-

181. *Rowland v. Christian*, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968). See note 127 & accompanying text *supra*.

182. CALIFORNIA CITIZENS' COMMISSION ON TORT REFORM, RIGHTING THE LIABILITY BALANCE 59-60 (1977).

183. *Id.* at 60.

184. For an analysis of the effect that increased liability has upon the insurance market, see *id.* at 60, 89, 94-101, 104-09.

185. Two paragraphs of the majority opinion are devoted to the policy contentions raised by the defendants. This treatment does not, in reality, examine the validity of the defendant's fears; Justice Tobriner simply states that since the standard was that of ordinary care the jury may still absolve the School district of liability even though a student has been injured. 22 Cal. 3d at 518-19, 585 P.2d at 857, 150 Cal. Rptr. at 7.

ness" in supervision has required the court to address political questions of educational planning and quality.

Modern courts have been criticized recently for their abandonment of specificity in negligence doctrine and their endorsement of liability on a case-by-case basis guided by a unified concept of "reasonableness."¹⁸⁶ The essence of this attack is that the use of the broad definition of duty inevitably leads courts to confront issues not amenable to the adjudicative process.¹⁸⁷ Certain issues defy adjudication because they are not susceptible to orderly proof and argument.¹⁸⁸ Such questions are so inextricably intertwined with other related issues that the litigants can not focus upon one facet of the problem without engaging in a simultaneous, precarious balance of all other considerations. These problems have been loosely termed "polycentric" or "many centered" because the resolution of a particular question is merely tentative; later, when dealing with other aspects of the question, previous issues must be reassessed.¹⁸⁹ Polycentric problems thus are appropriately termed questions of planning or design requiring a high degree of individual discretion. Illustrations of this type of problem typically involve the assessment of complex technology, such as medical practice or product design, or the weighing of a special relationship, such as the extent of a governmental service to citizens.¹⁹⁰ In addressing claims which are highly polycentric, courts are asked to adjudicate behavior that can properly be demanded of technicians, managers, doc-

186. See Cooperrider, *A Comment on the Law of Torts*, 56 MICH. L. REV. 1291, 1310-12 (1958); Henderson, *supra* note 100, at 477-78.

187. See Henderson, *supra* note 100, at 477-78.

188. Professor Fuller argued that certain kinds of social questions are not suitable material for the adjudicative process because of the particular institutional framework in which litigants must operate. This framework accords to the participants the opportunity to present proofs and arguments for a decision in their favor. However, because they contain no single issue toward which the affected parties may direct their proofs and argument in an orderly manner, some problems are ill-suited to the judicial framework. As a result the parties, unable to offer proof and argument, are denied the opportunity to affect the court's "institutional" decision. Moreover, this absence of meaningful participation also impairs the integrity of the adjudicative system itself. Fuller, *Adjudication and the Rule of Law*, 1960 PROC. AM. SOC'Y INT'L L. 1, 1-5.

189. "[P]olycentric problems are many-centered problems, in which each point for decision is related to all the others as are the strands of a spider web. If [any] one strand is pulled, a complex pattern of readjustments will occur throughout the entire web A lawyer seeking to base his argument upon established principle and required to address himself in discourse to each of a dozen strands, or issues, would find his task frustratingly impossible Unlike most of the traditional types of cases in which litigants are able, in effect, to freeze the rest of the web as they concentrate upon each separate strand, the web here retains its natural flexibility, adjusting itself in seemingly infinite variations as each new point, or strand, in the argument is reached." Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1536 (1973); Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 1, 33-34 (1963).

190. Henderson, *supra* note 100, at 484-514.

tors, and government agents. Each of these experts are better equipped than tribunals to gather and analyze complex factual considerations. Moreover, the complexity of their professional behavior entails a weighing of diverse interests, such as the proper allocation of resources, that exceeds the simplicity contemplated by the "reasonableness" standard.¹⁹¹

Implicit in these arguments is a recognition that doctrine, or specific rules of duty, enables a disciplined approach to problems that defy rational resolution.¹⁹² For example, by invoking notions of status and situs courts can insulate themselves from or severely limit their inquiry into these questions by stating there is no duty, that duty is very limited, or by applying tests of behavior more specific than "reasonableness." In order to achieve the goals of efficient loss-allocation, victim compensation and accident prevention, however, the modern trend in duty exerts tremendous pressure upon courts to expand and simplify concepts of negligence and thus frequently abrogates such limiting or insulating doctrine. Thus, with the absence of specificity in the definition of duty courts begin to encroach upon processes which involve highly discretionary choices.¹⁹³

This criticism may obscure the fact that most questions of liability in tort law are exceedingly complex. Moreover, describing problems as "polycentric" cannot conceal that most negligence issues are to a degree political and thus involve a balance of complicated and disparate values.¹⁹⁴ For example, when modern policy needs dictated the abrogation of outdated doctrine, the courts in California have been justified in responding with expansion and simplification.¹⁹⁵ Nonetheless, this quest for simplicity in and expansion of duty and the concomitant derogation of doctrinal authority typical of the California trend in tort law has resulted in decisions that at times pay little heed to the substantive or overall impact of the decision. Thus, in order to reach social and economic goals courts may become preoccupied with permitting juries to hear cases guided by the rule of reasonableness, and disregard that such an approach may produce an irrational result.¹⁹⁶ *Hoyem* is one such instance.

The decision in *Hoyem* to extend schoolyard liability to include injuries to truants ignores the fact that the question of compensating one victim cannot be considered intelligently without addressing simul-

191. *Id.*; see Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

192. Henderson, *supra* note 100, at 477-79. See also Keeton, *Creative Continuity In the Law of Torts*, 75 HARV. L. REV. 463, 468-72 (1962).

193. Henderson, *supra* note 100, at 477-82.

194. See notes 95-99 & accompanying text *supra*.

195. See Horvitz, *supra* note 87.

196. Henderson, *supra* note 100, at 468.

taneously its impact on a number of shifting and diverse variables. Resolution of this problem collides with considerations over the nature of school financing, the fluctuations in insurance costs, the adverse political climate faced by schools, the unavoidable risk that truancy presents to school operation, and the difficulty of distinguishing justly and consistently among the claims of truants and other students.¹⁹⁷ Moreover, the decision fails to pay deference to the professional choices made by school authorities who must, on a daily basis, balance the obligation of supervision against the task of educating students. This balance is a managerial chore best suited to the discretion of school officials. Thus, when supervisors and teachers strike the balance between the fundamental purpose of education and the problem of student safety, they must do so with confidence that their intuitive choices based upon a professional judgment of the particular students, the physical surroundings of the school, and the nature of the community will not be upset.¹⁹⁸

The presence of these complicating factors reveals that more is involved in *Hoyem* than a dispute reflecting an isolated problem. Essentially, the supreme court was asked to determine the contours of the complex social relationship between government, educators, parents and students. The adjudication of this problem addresses the "reasonableness" of an educator's managerial or professional choice. More significantly, it attempts to rule on the optimal delegation of educational resources.

The Tobriner majority, by adhering to the modern trends of duty, failed to confront the pervasive implications of its own decision. Instead, it yielded to the modern pressures to prevent accidents, allocate loss, and compensate injury by recognizing an essentially new cause of action and opting for a basic rule of reasonableness. Thus, by rejecting status and situs doctrine as irrelevant and requiring a case-by-case approach to the *Hoyem* problem it delegated the analytical difficulties of the truant issue to the trier of fact.¹⁹⁹

The *Hoyem* court, therefore, should have established a limitation on duty based on injury situs and victim status. A limited rule of duty phrased in such a way is not necessarily anachronistic, and may present the most workable approach to ensuring the prediction of risk essential to school operation. At a critical time for education such a construction

197. See notes 162-71, 178-82 & accompanying text *supra*.

198. See notes 172-79 & accompanying text *supra*.

199. Professor Henderson has referred to the application of the "reasonableness" test as a "judicial sleight of hand" by which a court obscures the analytical difficulties of problems involving social design and planning. Thus the judiciary abdicates its responsibility to avoid the role of social planner, and leaves the decision to the collective intuition of the jury. Henderson, *supra* note 100, at 478-80.

would have gone far toward clarifying educators' roles by investing in them the professional discretion necessary to accomplish a complicated task. If the California court had been less concerned with conforming to its own trends in duty and more attentive to the multi-faceted nature of the truant issue, then it might have exercised more restraint. Because the court abdicated its responsibility to screen from adjudication an issue best left to political solution, the state legislature should speak to the issue by insulating school authorities from liability for truant injuries.²⁰⁰

Conclusion

Hoyem involved a remarkable confrontation of interests. The call for greater judicial inquiry into the administration of education, compensation of victims, and continuity was balanced against the value of placing definable limits upon adjudicability and the need to leave some decisions to professional discretion. The outcome creates grave doubts as to the ability of the courts to successfully resolve this balance where the vexing and far-reaching problem of liability for truant injuries is at stake. Whether the quality of education will be measurably altered by *Hoyem* is difficult to ascertain. The decision, however, by failing to recognize that educators are professionals with complex roles places the adequacy of supervisory practices into a state of uncertainty at a time when schools should concentrate on more important tasks. Hopefully, the furthest scope of attempted adjudicability is indicated by *Hoyem*.

200. A bill to amend CAL. EDUC. CODE § 44808 (West 1978) was introduced in the California State Senate on Dec. 5, 1978. The bill precluded liability for the "conduct or safety of any pupil of the public schools not on school property who has left school property without permission of a school officer or employee during such pupil's prescribed school hours." S.B. 60 (1979-80). S.B. 60 was amended to condition this bar from liability upon school authorities' notification or reasonable attempt to notify the parents or guardians of truants who are discovered missing. The amended bill states that this condition "does not change the duty of school officers and employees to know or ascertain the whereabouts of school pupils, or change any possible liability relating to such duty." See Cal. Sen. J., Feb. 16, 1979, at 557, 568.

As an alternative to the proposal in S.B. 60 or to an absolute bar from liability, the Legislature may wish to consider a standard of care for school authorities that is more specific than the current standard of an ordinary person entrusted with the care of school age children. See note 17 & accompanying text *supra*. For example, a professional standard of care, the measure of the performance typically offered by other members of the teaching profession in the community, would provide some specificity and would recognize the special complexities of the teacher's role. The question of negligence then would be subject to expert testimony with respect to the proper behavior in reconciling the daily conflict between the duties of supervision and instruction. Cf. *Landeros v. Flood*, 17 Cal. 3d 399, 410, 551 P.2d 389, 394, 131 Cal. Rptr. 69, 74 (1976) (medical malpractice actions subject to expert testimony by other physicians). Imposition of a professional standard of care would recognize that in modern society teachers are charged with a unique role that defies the simple characterization of an "ordinary person charged with the care of school age children."

If the limits of judicial inquiry are not so evidenced, then the flexible and expansive nature of modern duty may again immerse the California courts in questions, such as those concerning the design and plan of public education, that are inherently political.